

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1209

To be argued by
HENRY H. KORN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1209

UNITED STATES OF AMERICA,

Appellee,

—v.—

THOMAS BANKS,

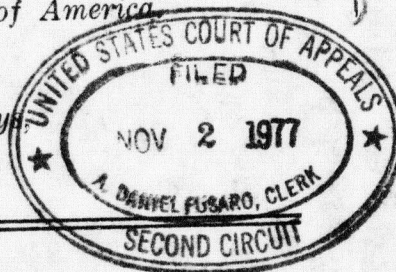
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

HENRY H. KORN,
ROBERT J. JOSSEN,
*Assistant United States Attorney
Of Counsel.*



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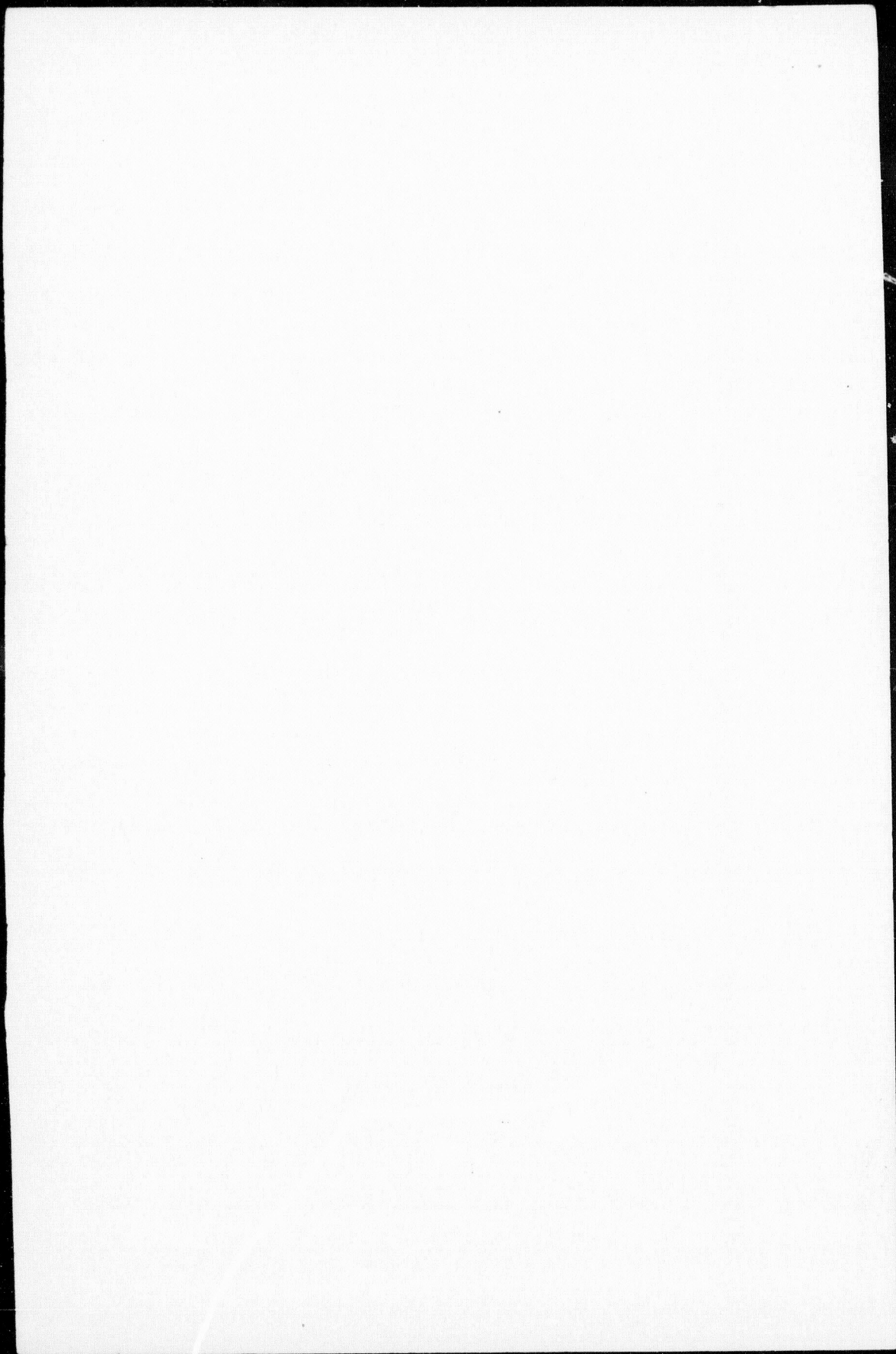


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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1209

UNITED STATES OF AMERICA,

Appellee,

—v.—

THOMAS BANKS,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Thomas Banks appeals from a judgment of conviction entered on March 24, 1977, in the United States District Court for the Southern District of New York, after a four-day trial before the Honorable Richard Owen, United States District Judge, and a jury.

Indictment S76 Cr. 736, filed February 3, 1977, charged Banks, a postal service employee, in five counts with conspiracy to steal mail and with embezzling four checks in violation, respectively, of Title 18, United States Code, Sections 371 and 1709.*

* This indictment superseded Indictment 76 Cr. 736, filed on August 10, 1976, which charged Banks in a single count with conspiracy to steal mail.

Trial commenced on February 7, 1977 and concluded on February 11, 1977, when the jury found Banks guilty on Counts One, Three, and Four.*

On March 24, 1977, Judge Owen sentenced Banks to concurrent terms of 2 years imprisonment on Counts One and Three, suspended the imposition of sentence on Count Four, and imposed a 5 year period of probation to follow completion of the prison term. Banks surrendered to the United States Marshal on April 25, 1977 and presently is serving his sentence.**

* On the second day of trial the District Court dismissed Counts Two and Five on the Government's motion. The District Court requested the Government to prepare a redacted indictment for the jury. It is this indictment which Banks erroneously claims was the third indictment filed in this case. (Br. 6).

** The delay in perfecting this appeal is attributable to defendant. This Court's original scheduling order required Banks to file his brief and appendix on or before May 25, 1977. This was not done. Instead, on June 8, 1977, Banks' attorney filed a motion asking for an additional six weeks to perfect the appeal, claiming he was unable to perfect the appeal in the required time, in part, because he was involved in a criminal trial in Brooklyn which occupied five weeks of his time. The Government opposed the motion and submitted an affidavit of the prosecutor in Brooklyn who stated that the hearings and trial occupied only two weeks in May 1977. This Court, nevertheless, granted Banks' motion and issued a modified scheduling order that required Banks to file his brief and appendix on or before July 27, 1977. This was not done. On September 30, 1977, the clerk's office wrote to Banks, with a copy of the letter sent to Banks' attorney, to advise Banks that his appeal would be dismissed for failure to file his brief on July 27, 1977. Thereafter, on October 7, 1977, Banks' brief and appendix were served on the Government.

Statement of Facts

The Government's Case

A. Synopsis

The Government proved that from May 1973 through August 1976, Thomas Banks, while employed as a mail carrier in the Bronx, embezzled checks from the mail that he was required to deliver to people on his route and conspired with several other people to cash these stolen checks at a small grocery store located at 1294 College Avenue in the Bronx. While Banks was the focal point of the conspiracy and directly profitted the most from his endeavors, he employed the assistance of four others, Virgilio Aponte, Nelson Perez, Pedro Perez and William Jones, to cash the checks stolen by defendant. The Government proved its case by calling Aponte, Nelson and Pedro Perez and Gilbert Hernandez as witnesses.

B. Banks' Position as a Mail Carrier

Banks had been employed as a mailman since 1967 (Tr. 359) * and during the period from May 1973 through August 1976 was assigned to the Morrisania Post Office in the Bronx. (Tr. 232). During the period of time charged in the indictment, Banks was responsible for the delivery of mail on route 24, which covered an area in the Bronx bounded by 168th to 169th Streets and Findlay and College Avenues. (Tr. 233). Both 1405 and 1420 College Avenue were on Banks' route. (Tr. 234, 235; GX 1 and GX 5). The grocery store located at 1294 College Avenue also was on Banks' route. (Tr. 163, 368, 390).

* "Tr." refers to the pages of the trial transcript; "B. App." refers to Banks' appendix. "GX" refers to Government exhibits, and "Br." refers to Banks' brief.

C. Banks enlists the aid of Virgilio Aponte to cash stolen checks

Between 1973 and 1974, Virgilio Aponte owned the grocery store at 1294 College Avenue (Tr. 77),* and knew Banks, who, while in uniform, regularly came to his store around noon each day and stayed for several hours. (Tr. 80). During one of Banks' daily visits to the store he proposed to Aponte that Aponte could make between \$20 and \$30 for forging and then cashing checks for Banks. (Tr. 84). Aponte readily agreed and thereafter cashed between 12 and 13 checks for Banks. (Tr. 85). Among the checks cashed by Aponte was a welfare check in the amount of \$80.50, payable to Minnie Oliver, 1405 College Avenue, which Banks provided to him. (Tr. 86; GX 1). Banks asked Aponte to cash the Oliver check and told him not to worry because Oliver had moved from the address that appeared on the check. (Tr. 87). Aponte forged Oliver's name, kept about one-third of the proceeds and gave the remainder to Banks. (Tr. 86).

Aponte, who testified as a witness called by the Government, recalled that several checks which Banks gave to him to forge and cash, later were returned to Aponte by grocery supply companies—to whom Aponte had given the checks in payment of merchandise for his store. The companies complained that the checks were stolen (Tr. 107) and Aponte repaid them in full. (Tr. 106). Aponte advised Banks that he had to reimburse the supply companies for stolen checks. Banks told Aponte that he would reimburse Aponte for each check, less the \$20 to \$30 which Aponte had kept. (Tr. 109).

* In August 1974, he sold the store to Nelson Perez. (Tr. 79). Aponte now lives in Puerto Rico and works for the Puerto Rican Department of Commerce. (Tr. 70).

During Banks' daily visits to Aponte's store, Aponte also saw defendant hand out welfare checks to customers in the store and, in return, receive cash for this "service". (Tr. 81). Oftentimes, Banks asked Aponte to cash checks for the people to whom Banks had given welfare checks. Aponte agreed, and was paid between \$3 and \$5 per check. (Tr. 91, 157).

D. Banks continues his stolen check-cashing operation with Nelson Perez and Pedro Perez

In August 1974 Aponte sold the grocery story to Nelson Perez, (Tr. 79), who readily assumed his predecessor's role as Banks' check casher. Banks continued his daily visits to the store, (Tr. 165, 166), and, like Aponte before him, Perez saw Banks hand out checks to people in the store in return for cash. (Tr. 167).

Banks similarly proposed to Perez that he cash checks for defendant, as had Aponte, and retain one-half of the proceeds for each check cashed. (Tr. 169, 189). Banks also assured Perez that the payees of the checks did not live at the addresses on the checks and that Perez need not worry about cashing the checks. Banks promised to indemnify Perez for any check subsequently returned. (Tr. 189, 190). Perez, too, readily agreed and cashed seven or eight checks for Banks. (Tr. 189).*

* On one occasion Banks asked Perez to cash a State tax refund check in the amount of \$24, payable to Carmen Febres, 2343 Morris Avenue, Bronx, New York, 10468. That address was not on Banks' route. (Tr. 235). Perez noticed that the Febres check was already endorsed when Banks gave it to him to cash. (Tr. 171-172; GX 4). Banks told Perez that a friend had given him the check. However, Perez asked Banks to sign his name on the check. Perez testified that he saw Banks hold the Febres check in his hand and sign his name on the check. (Tr. 193). Banks did not give Perez any money to cash the Febres check. (Tr. 175).

During this same time period Pedro Perez on occasion helped his brother, Nelson, in running the grocery store at 1294 College Avenue. (Tr. 213). Pedro saw Banks at the store every day in uniform (Tr. 215), and also observed Banks deliver mail to people in the store for a fee. (Tr. 213, 217).

While Pedro was working at the store, Banks asked him to cash two welfare checks. (Tr. 217).^{*} One of the checks was in the amount of \$175, payable to Frederick Burnett, 1420 College Avenue. (Tr. 217; GX 5). On that occasion Banks came to the store with a woman and asked Pedro to cash the check for her. (Tr. 218). The check already was endorsed "Burnett Frederick" when Banks handed it to Pedro. Pedro then cashed the check for Banks. (Tr. 218). Afterwards, Pedro gave the check to a milkman, who eventually returned the Burnett check to Pedro, claiming that it was no good. (Tr. 218). When Pedro told Banks, Banks said he would tell the woman to repay Pedro. Pedro Perez, however, never was reimbursed for this check. (Tr. 219).^{**}

E. Banks supplies stolen checks to William Jones

William Jones was not called by the Government as a witness, because the Government could not find him. (B. App. 7). However, Gilbert Hernandez, a narcotics addict and Jones' partner, testified to their dealings with Banks.

Perez used the checks which he cashed for Banks to pay for merchandise from grocery supply companies (Tr. 191), and he recalled that between two and three of the checks were returned to him from the suppliers. Banks gave Perez money to reimburse the suppliers. (Tr. 191, 192).

^{*} Pedro testified that while he worked in the store, the only person for whom he would cash checks was Banks. If anyone else wanted to cash checks, Pedro directed that person to a check casher located one block from the store. (Tr. 227).

^{**} Frederick Burnett and Minnie Oliver both testified that they did not receive their welfare checks, that the signatures on the checks were not theirs and that they did not authorize anyone to sign the checks for them. (Tr. 47-50, 56-57).

Hernandez and Jones worked together stealing and cashing checks as early as January 1976. (Tr. 276).^{*} One day in March 1976, Jones met Hernandez and told him that instead of breaking into mail boxes to get checks, they would receive checks from a mailman. (Tr. 264). Jones told Hernandez that the mailman would get one-third of the proceeds of each check. (Tr. 265). Together, they then drove in Jones' car to the grocery store at 1294 College Avenue. Jones parked the car in front of the store so that the car was facing north on College Avenue. (Tr. 265). Hernandez stayed in the car while Jones walked into the store. (Tr. 265, 266).

Hernandez then saw Jones meet with Banks, who handed Jones several envelopes. (Tr. 266).^{**} When Jones returned to the car, Hernandez saw the envelopes in Jones' right-hand pocket and recognized them as United States Treasury checks. (Tr. 269). Jones said that he would prepare the identification cards for the checks and meet Hernandez when the identification cards were ready. (Tr. 270).

Later that day, Jones gave Hernandez a United States Treasury check in the approximate amount of \$300 and

^{*} Initially, the two obtained checks either by breaking into mail boxes in neighborhoods other than on 168th and 169th Streets and College and Findlay Avenues in the Bronx (Tr. 276), or Jones would give Hernandez checks that Jones obtained. Some of these checks had addresses located on Banks' route. (Tr. 280). The terms of the agreement between Jones and Hernandez were that Hernandez would receive one third of the face value of any check that Jones obtained, or one-half of the proceeds of a check that both had obtained together. (Tr. 282). Jones also would provide Hernandez with false identifications to cash the checks. (Tr. 283).

^{**} Hernandez had seen Banks on other occasions before that day while Banks delivered mail on route 24. Hernandez's parents lived on Banks' route. (Tr. 268).

a corresponding identification card. (Tr. 270-271). The two drove in Jones' car to a supermarket where Hernandez cashed the check, kept one-third of the proceeds and gave the rest to Jones. (Tr. 272). Hernandez saw Jones put the money into an envelope that contained other money. (Tr. 273). Jones told Hernandez that they were going back to the store at 1294 College Avenue to give the mailman his share. (Tr. 273).

On returning to the store, Hernandez remained in Jones' car, again parked in a northerly direction on College Avenue in front of the store. Hernandez saw Jones meet with Banks inside the store and hand Banks the envelope with the money. A few minutes later, he saw Jones and Banks leave the store. As Jones re-entered the car, Hernandez saw Banks walk south on College Avenue. (Tr. 274).

The Defense Case

Banks testified in his own behalf and called three other witnesses.

Thomas J. Donovan, Assistant Director of the United States Postal Inspection Service Crime Laboratory in Washington, D.C., an expert in analyzing handwriting, testified that he examined a photocopy of the Febres check (GX 4) and could not identify Banks as the author of the word "Banks" written on the check. (Tr. 340, 345). Donovan explained, however, that his conclusion was not a firm one.*

* According to Donovan, his opinion regarding the author of "Banks" on the Febres check was affected by the fact that the laboratory was furnished with a copy of the check, and not the original. As a result, Donovan was unable to analyze line pressures appearing on the original document. (Tr. 347-348). Additionally, Donovan believed the fact that Banks may have written the word "Banks" while the check was in the palm of his hand could have prevented a positive identification of Banks as the author. (Tr. 349).

Defendant Banks testified in his own behalf. First, he explained in detail how he had purchased a home in 1974 at 2141 Story Avenue in the Bronx, at a cost of \$35,000 and obtained a mortgage guaranteed by the Veteran's Administration. (Tr. 316-362, 379, 382). Banks admitted that, with the help of Aponte, he falsified various documents in order to have his loan application approved by the Veteran's Administration. Specifically, Banks told Aponte that he did not have sufficient funds to buy a home and asked Aponte to represent that Banks was employed part-time at the grocery store (Tr. 363-364), even though Banks never worked for Aponte or received money from him as an employee. (Tr. 365). Aponte complied and signed a verification of employment form which stated that Banks earned approximately \$5100 as a clerk and had worked at the store for about three years. (Tr. 379; GX 13).*

Banks admitted that he cashed checks at the grocery store, but claimed he only cashed checks for people on his route who asked him to cash their checks because their mail boxes had been broken. (Tr. 370). Banks denied ever asking Aponte or either of the Perez brothers to cash another person's checks for him so that he could keep the proceeds. (Tr. 372, 376). Banks could not recall if he knew William Jones (Tr. 374); but specifically denied ever cashing checks with Jones in order to keep the proceeds. (Tr. 376).

* Banks also filled out an affidavit in which he represented that he worked as a mailman, earning approximately \$11,000, and on a part-time basis at the grocery store, earning approximately \$5,100. (Tr. 378; GX 12). Banks then submitted his affidavit and Aponte's verification of employment form, together with a loan application (GX 14) to the Veteran's Administration to guarantee a mortgage which Banks sought to obtain from Nationwide Holding Corporation. (Tr. 364-465, 382).

Banks also called two witnesses who testified that their mail boxes had been broken into and that on occasion each had asked Banks to deliver their mail to the store at 1294 College Avenue. (Tr. 411-412, 417).

ARGUMENT

The District Court's Denial of Defendant's Request to Adjourn the Trial Was Proper and Did Not Deny Defendant A Fair Trial.

The central thrust of Banks' appeal is that Judge Owen erred in denying defendant's application—made for the first time on the morning of the scheduled trial date—to adjourn the start of the trial. From this, Banks argues that he suffered prejudice because his attorney allegedly was not prepared to try the case in the context of the superseding indictment that is claimed to have altered the substance of the Government's proof. These contentions ignore the facts, as Judge Owen specifically found, that all information contained in the superseding indictment was available earlier to defendant upon proper request, and, in any event plainly would have been admissible at a trial on the original indictment. Moreover, defendant's claim of prejudice simply is inconsistent with the fact that he ultimately received the very relief he had requested—an adjournment and appointment of an investigator to assist the defense—in ample time to present a full and meaningful defense case. In short, as we will now demonstrate, the record makes clear that defendant received a fair trial and was not denied effective assistance of counsel.

A. The application for an adjournment on the day of trial

On the morning of the scheduled trial date, February 7, 1977, defense counsel requested an adjournment of the trial on the grounds that the superseding indictment, filed February 3, 1977, changed the substance of the case against Banks and thus necessitated the services of an investigator to assist in the preparation of a defense. (Tr. 2-3).*

Upon inquiry, Judge Owen was advised that defendant never had asked the Government for the names of other known conspirators referred to in the *original* indictment, or any other matters properly discoverable in a bill of particulars. (Tr. 9-10).** The court also learned that on

* The original indictment, filed on August 16, 1976, charged Banks with conspiring with William Jones and other persons, known and unknown, to steal mail. The indictment charged that as overt acts in furtherance of the conspiracy, Jones met with William Smith in December 1973, and that in March 1976, Banks and Jones met in a grocery store on College Avenue in the Bronx. The superseding indictment, filed on February 3, 1977, also charged Banks with conspiring with Jones and other persons, known and unknown, to steal mail. The superseding indictment charged as overt acts that Banks presented four state and city checks at a grocery store at 1294 College Avenue in the Bronx and that Banks met with Jones in March 1976 in that store. The superseding indictment also charged Banks with four counts of embezzlement.

** The single exception to the absence of a discovery demand was defendant's much earlier request for copies of stolen checks. Defense counsel was advised by the Assistant United States Attorney originally responsible for the prosecution that such checks were not yet available, but would be in the future. Thereafter, although the case was assigned to a different Assistant United States Attorney for trial, defense counsel never followed up his earlier request. (Tr. 24-25). Cf. *United States v. Armado-Sarmiento*, 545 F.2d 785, 791 (2d Cir. 1976), *cert. denied*, — U.S. — (1977).

February 3, 1977, when the superseding indictment was filed, the prosecutor telephoned the defense attorney and read to him the entire indictment. (Tr. 9). Finally, Judge Owen was advised that on February 4, 1977, the prosecutor again telephoned the defense attorney and repeated to him the specific address of the grocery store referred to in the indictment, gave him the names of all Government witnesses (Tr. 9-10), and offered to make all 3500 material available on February 4. However, that date was not convenient for the defense attorney. Accordingly, counsel agreed to meet on Sunday, February 6, 1977. (Tr. 10). Although the prosecutor was in the office at the scheduled meeting time, the defense attorney precipitously left the office when he could not reach the prosecutor by telephone and did not obtain the 3500 material on that day. (Tr. 5).

In the course of the colloquy with the trial judge, defense counsel represented that the purpose of the requested adjournment was to enable further investigation by the defense at the College Avenue grocery store referred to in both indictments. Toward this end, counsel also applied for funds under the Criminal Justice Act to retain an investigator.

After hearing argument from defense counsel and being advised of the pertinent facts by both sides, Judge Owen carefully compared the original indictment with the superseding indictment. The trial judge concluded that (i) the Government had not altered the charges or the theory of its case and (ii) in any event, the Government would have been entitled at a trial on the original indictment to prove the additional overt acts and embezzlement counts included in the superseding indictment. Moreover, Judge Owen specifically noted that the additional overt acts, as well as the names of other co-conspirators, could have been "fully discoverable by a demand for a bill of particulars or a request for discovery,"

and that the central meeting place referred to in both indictments—the College Avenue grocery store—was known to defendant as early as the filing date of the original indictment. (Tr. 20, 23). Accordingly, Judge Owen denied the requested adjournment of the start of the trial.

However, to accommodate defendant's request to utilize an investigator to discover witnesses for the defense, the District Court agreed to give the defense a mid-trial continuance—the entire day on Thursday, February 10, 1977,—in order to work with the investigator. Judge Owen also granted defendant \$200 in "CJA" funds to retain the services of an investigator on his behalf.

Trial commenced and was recessed, as promised, for the entire day on Thursday, February 10, 1977. Defendant made use of that continuance to obtain two witnesses who testified during the defense case on Friday, February 11, 1977.

B. The District Court's action did not deny defendant a fair trial

Banks' contentions in this Court all proceed on the premise that a continuance should have been granted because the Government unfairly changed the substance of its case in the superseding indictment. In the face of Judge Owen's clear and proper finding that at all times Banks could have sought—but did not—to learn more of the Government's case through proper discovery channels, it is plain that the central building block of defendant's argument does not withstand analysis.

It is axiomatic that a request for a continuance is addressed to the sound discretion of the District Court, the exercise of which will not be reversed on appeal absent a showing of clear abuse. *United States v. Rastelli*, 551 F.2d 902 (2d Cir. 1977); *United States v. Frat-*

tini, 501 F.2d 1234, 1237 (2d Cir. 1974); *United States v. Barrera*, 486 F.2d 333, 339 (2d Cir. 1973); *cert. denied sub nom. Pinto v. United States*, 416 U.S. 940 (1974); *United States v. Rosenthal*, 470 F.2d 837, 844 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973); *United States v. Coleman*, 272 F.2d 108, 110 (2d Cir. 1959); *United States v. Echeles*, 222 F.2d 114, 153 (7th Cir.), *cert. denied*, 350 U.S. 828 (1955). Furthermore, requests for adjournments on the day set for trial, such as occurred in this case, traditionally and justifiably are viewed with disfavor by the Courts. *United States v. Haller*, 333 F.2d 827 (2d Cir.), *cert. denied*, 379 U.S. 921 (1964); Wright, Federal Practice and Procedure § 832, p. 340.*

In the present case, Judge Owen did not abuse his broad discretion. The trial date had been set and counsel appointed to represent Banks, well in advance of trial. Defense counsel had ample time and opportunity to prepare a defense between the filing of the original indictment on August 16, 1976 and the start of trial five and one-half months later on February 7, 1977. Counsel had met with Banks to discuss the case at length, and the original indictment was sufficiently precise to put defendant and his counsel on notice with respect to proper

* This Court's observations in *United States v. Sanchez*, 459 F.2d 100, 103 (2d Cir.), *cert. denied*, 409 U.S. 864 (1972), are particularly apposite here:

"Once the trial judge has fixed a date and the parties and their counsel have made arrangements accordingly, . . . no postponement should be granted except for definite and certain reasons going to the heart of the fairness of the trial."

In this regard, Judge Owen noted the substantial inconvenience and burden on the District Court and the Government, engendered by defendant's truly "eleventh hour" request for an adjournment. (Tr. 8).

areas of inquiry and the nature of the charges.* Nor was Banks entitled to a continuance in order to secure defense witnesses. Although defendant long was aware of the trial date, at no time prior to the commencement date of the trial had he indicated any difficulty in locating witnesses or asked for the District Court's assistance to subpoena necessary witnesses pursuant to Fed. R. Crim.

* Banks' counsel contends that he prepared a defense on the theory that the case solely involved a conspiracy to steal checks and that the chief Government witness would be William Jones. In this regard, he claims to have relied on the prosecutor's affidavit, submitted in connection with a hearing before Judge Owen on January 20, 1977, in which the Government requested an exclusion under the Speedy Trial Act, 18 U.S.C. § 3161(h) (3) (A) and (B), on the grounds that Jones was an essential witness and could not be found, despite diligent efforts by the Government. Such reliance, however, was not properly placed, given defendant's failure to ask the Government for a list of its witnesses, or co-conspirators not named in the original indictment. (Tr. 9). Furthermore, the original indictment should have placed the defendant himself on notice that the Government's proof included transactions with others beside Jones. In fact, defense counsel indicated to the trial judge that Banks admitted to him that he had entered a grocery store on a number of occasions within the time period referred to in the indictment, but Banks claimed not to have known whether this was the same store referred to in the indictment. (Tr. 180). Given the specific reference to the street of the store in the indictment, that claim, later implicitly repeated by defendant himself (Tr. 182-A (10)) simply was incredible. In fact, it is apparent that Banks did not confide in his counsel all of the relevant information in his possession. The failure to have done so hardly could have justified defendant's last minute desire for an adjournment.

Finally, quite apart from the fact that defendant was advised as early as January 31, 1977 that the Government would proceed to trial without Jones, on February 4, 1977—4 days prior to trial—the Government supplied to defendant the names of all of its witnesses and all unindicted co-conspirators. Thus, defendant had a full four days to prepare for this relatively short and simple trial, more than ample time even if his preparation had not proceeded to the proper point prior to that time. In such circumstances, there was no requirement that the trial judge grant a continuance. *United States v. Reed*, 526 F.2d 740, 741 (2d Cir. 1975), cert. denied, 424 U.S. 956 (1976).

P. 17. In these circumstances, the denial of the continuance clearly was proper. *United States v. Taylor*, Dkt. Nos. 76-1210, 76-1256, 76-1264-66, 76-1288, slip op. 2805, 2830-31 (2d Cir., April 13, 1977); *United States v. Harris*, 436 F.2d 775, 778 (2d Cir. 1970).

Moreover, Banks' contention is rendered totally without merit on this record in view of the absence of any actual prejudice occasioned by the original denial of his continuance. In *United States v. Rastelli*, *supra*, 551 F.2d at 906, and cases cited therein, this Court made clear that a denial of a continuance will not be found to constitute an abuse of discretion in the absence of a particularization of prejudice. Here, as in *Rastelli*, defendant eventually received the very relief he had requested earlier, a continuance to obtain defense witnesses, and successfully made use of that time to present his defense. Further, while defendant half-heartedly suggests that the original denial of the continuance forced him to trial with an unprepared attorney and thus deprived him of effective assistance of counsel, the record clearly shows that Banks "was represented vigorously and competently by his counsel." *United States v. Rastelli*, *supra*, 551 F.2d at 906. Indeed, the record demonstrates that Banks' attorney effectively cross-examined the so-called "surprise" witnesses called by the Government,* presented an impressive

* For example, Banks' counsel brought out on cross-examination of Virgilio Aponte that although he owned the grocery store, he kept the store in the name of Jose Rosado Santiago in order to obtain a liquor license from New York State and thereby defrauded the State. (Tr. 113). Aponte also admitted that Banks brought him several new customers, including Norma Williams (Tr. 117), and that Banks would leave mail with Aponte for several people on his route who would pick their mail up at the store—consistent with Banks' defense. (Tr. 116). Finally, Banks' counsel also extensively examined the circumstances surrounding Aponte's agreement with the Government not to be prosecuted for the checks which he forged, thereby suggesting a motive to lie. (Tr. 125-131).

and novel defense,* and persuasively argued his client's defense to the jury. In short, defense counsel's representation plainly comported with the standard enforced in this Circuit and certainly was not such as to shock the conscience or to make the proceedings in the trial court a farce and mockery of justice. See, e.g., *United States v. Bubar*, Dkt. No. 76-1140, slip op. 4519, 4536 (2d Cir., June 30, 1977), quoting *Rickenbacker v. Warden*, 550 F.2d 62, 65 (2d Cir. 1976), *petition for cert. filed*, 46 U.S.L.W. 3093 (U.S. Aug. 30, 1977) and *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950). See also, *United States v. Taylor*, *supra*, slip op. at 2829, 2842-43 (2d Cir. April 13, 1977); *Lunz v. Henderson*, 533 F.2d 1322, 1327 (2d Cir.), *cert. denied*, 429 U.S. 849 (1976); *United States ex rel. King v. Shubin*, 522 F.2d 527, 529 (2d Cir.), *cert. denied*, 423 U.S. 990 (1975); *United States v. Yanishefsky*, 500 F.2d 1327,

On cross-examination of Nelson Perez, Banks' counsel brought out that Perez, who had been convicted after a jury trial of violating the federal narcotics laws (Tr. 199), had not started serving his three year prison sentence, so that the jury could infer he had a motive to frame Banks; namely, later consideration by the Government for a reduction of sentence. (Tr. 203).

Similarly, when Pedro Perez was cross-examined, defense counsel brought out that Perez also had not been charged by the Government for any crime growing out of his activity with Banks, (Tr. 224), that while working for his brother, Pedro Perez was also collecting unemployment benefits from the State. (Tr. 229).

These matters later were used effectively by counsel in summation, when he reminded the jury of the immunity which Aponte, Nelson and Pedro Perez received for testifying for the Government. (Tr. 445, 454).

* Banks' defense was that because of the widespread vandalism of mail boxes and theft of checks, many people on his mail route asked Banks to deliver their mail to the grocery store for safekeeping. In support of this defense, after the court gave the defense a two-day recess in the middle of trial to work with their investigator, Banks called two witnesses who testified that they had asked Banks not to deliver their mail to their apartments, but to the grocery store for safety reasons. (Tr. 411-412, 417).

1333 (2d Cir. 1974); *United States ex rel. Testamark v. Vincent*, 496 F.2d 641, 643 (2d Cir. 1974), *cert. denied*, 421 U.S. 951 (1975).

Thus, the record simply belies any claim of prejudice arising from the denial of an adjournment, and makes manifest that Banks was afforded a fair trial at all stages of the proceeding.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

HENRY H. KORN,
ROBERT J. JOSSEN,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

RICHARD F. LAWLER being duly sworn,
deposes and says that he is employed in the office
of the United States Attorney for the Southern District
of New York.

That on the *2nd* day of *November*,
1977, he served a copy of the within *Brief*
by placing the same in a properly postpaid franked
envelope addressed:

HERBERT O. BROWN, ESQ.
53 SEAWAVE ROAD
EAST ROCKAWAY, N.Y. 11518

And deponent further says that he sealed the said
envelope and placed the same in the mail box for mail-
ing at One St. Andrew's Plaza, Borough of Manhattan,
City of New York.

Richard F. Lawler

Sworn to before me this
2d day of *November*, 1977

HENRY H. KORN, Notary Public,
State of New York, No. 31-4625558
Qualified in New York County
Commission Expires March 30, 1978